

Surveillance Tapes

In several past issues we discussed the split in the departments over the disclosure of surveillance tapes. Previously, the Second, Third and Fourth Department Appellate Divisions had held that a defendant must exchange a surveillance tape before conducting a deposition of the plaintiff. In Tran v. New Rochelle Hospital Medical Center, 2003 N.Y. Lexis 183, the Court of Appeals agreed with the majority of the Departments and reversed the First Department's holding by ruling that the video tape must be exchanged prior to the plaintiff's deposition.

By way of background, the courts who have decided these cases have struggled in an effort to balance two competing interests; the defendant's desire in preventing the plaintiff from tailoring his or her testimony and the plaintiff's concern regarding the deceptive alteration of the tapes. This issue was resolved in favor of the defendant in DiMichel v. South Buffalo Ry. Co., 80 N.Y.2d 184 (1992). Confusion arose however because shortly after the DiMichel decision The Legislature enacted CPLR 3101(i) which requires disclosure of all surveillance tape taken, not just those portions which a party intends to use at trial.

The question before the Court of Appeals was whether section 3101(i) overruled that aspect of DiMichel which allowed defendants to withhold surveillance tapes until after the plaintiff was deposed. According to the Court, a key issue in the analysis is that prior to 3101(i), the tapes were subject to a qualified privilege. 3101(i) specifically states that the tapes are subject to "full disclosure", thus eliminating any qualified privilege. The elimination of the privilege does alter one of the rationales of DiMichel, nevertheless, 3101(i) does not address the timing of the disclosure of the tape. While one could take the silence to mean that the Legislature did not mean to disturb the timing aspect of DiMichel, however, the Court felt that the Legislature did not mean to codify the timing aspect.

The Court gave several reasons for its holding. The first was elimination of the qualified privilege. More important was the inclusion of was an entirely new subdivision of 3101 which dealt exclusively with surveillance tapes. The Court felt that the Legislature must have known that the holding in DiMichel was premised on the fact that surveillance tapes fell under CPLR 3101(d)(2), which contains items subject to a qualified privilege. By taking surveillance tapes out of 3101(d)(2), the Court felt that the Legislature was rejecting DiMichel. Finally, the Court noted that two groups who opposed 3101(i) did so because it did not limit disclosure of the tapes until after the plaintiff was deposed.

The Court recognized that its holding created the danger of the plaintiff tailoring his or her testimony. The Court sympathized with that danger, but felt that 3101(i) precluded them from reaching any other decision.

Vicarious Liability

In Hassan v. Hendel Products, 2003 N.Y. Lexis 150 the Court of Appeals addressed an issue under Vehicle and Traffic Law section 388 that had divided the Second Department. The issue involved whether the plaintiff, who qualified as an “owner” under the statute, could recover from the parties who owned and leased the vehicle. The Court of Appeals reversed the Appellate Division and held that the plaintiff could maintain her action.

Plaintiff Hassan was employed by defendant Hendel Products. Hendel provided her with a company car which was leased from First Union Auto Finance, Inc, for both business and personal use. On the day of the accident, the plaintiff was a passenger in the vehicle which was being driven by her husband. (There was no dispute that the plaintiff’s husband was a permissive user). While driving through an intersection, the plaintiff’s husband collided with a truck. As a result, the plaintiff’s husband was killed and the plaintiff severely injured.

The plaintiff brought an action through Vehicle and Traffic Law section 388 against First Union and Hendel as owners of the vehicle in which she was a passenger. Hendel and First Union moved for summary judgment, asserting that the plaintiff, as a co-owner of the vehicle was not eligible to bring a claim for damages against them.. The trial court denied the motion but a divided Appellate Division reversed.

Vehicle and Traffic Law section 388, is well known to all, however, as the exact language of the statute is critical here, we quote it in full:

Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission , express or implied, of such owner.

Not so well known, but central to this case is VTL section 128 which defines an “owner” as “any lessee or bailee of a motor vehicle or vessel having the exclusive use thereof , under a lease or otherwise, for a period greater than thirty days.” Although the Court states that it “assumes without deciding” that the plaintiff is a statutory owner, it appears clear from the facts of the case that the plaintiff is an “owner” as defined by section 128.

In holding that the plaintiff is not precluded from bringing a claim against Hendel and First Union, the Court focuses on the first two words of section 388- “every owner.” The Court correctly notes that the statute in no way limits the class of possible plaintiffs to non-owners. As such, regardless of the plaintiff’s status as an owner, the fact that her husband operated the vehicle with the consent of Hendel and First Union was sufficient to bring her within the protection of the statute

It should be noted that the repeal of VTL section 388 is again on the tort reform agenda in the New York State Legislature this legislative session.

Open and Obvious Defects

We've noticed a number of recent trip and fall cases where a defendant moved for summary judgment arguing that the defect which caused the fall was "open and obvious." A divided Appellate Term was the most recent court to address the issue in Rogers v. Spirit Cruises, Inc., 2003 N.Y. Misc. LEXIS 175.

The plaintiff in Rogers sued to recover damages for injuries sustained when she tripped and fell while attempting to step over a pile of garbage bags located on a pier leased by one of the defendants. During her routine exercise regimen, the plaintiff came upon 20 to 30 garbage bags that had been unloaded onto the pier shortly before the accident. The plaintiff attempted to step over the bags, however she fell when her foot got caught on one of the garbage bags. It is significant to note that the plaintiff admitted she could have avoided the bags either by walking around them or by simply turning around and going back.

The court held that whether or not the placement of the garbage bags on the pier created a dangerous condition, the "plaintiff was expressly aware of the condition and proceeded at her own peril." The court went on to state that while the issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question...a court may determine that the risk was open and obvious as a matter of law where the facts compel that conclusion. As the uncontested proof showed that the garbage bags were readily observable by reasonable use of one's senses and the plaintiff in fact saw and was aware of the bags before the accident, summary judgment was appropriate.

The dissent took issue with the majority interpretation of the law. Specifically, the dissent felt that the open and obvious doctrine is typically applied to situations where an inattentive plaintiff trips as a result of a plainly visible and easily avoidable object or condition

that is not inherently dangerous. The dissent further stated that the fact that a dangerous condition is readily observable does not negate the duty of a landowner or lessee to keep the premises reasonably safe, but simply raises triable issues as to the parties comparative negligence. Applying those principles to the instant case, the dissent concluded that the open and obvious nature of the garbage bags should not have served to shield the defendants from liability as a matter of law, but should have merely raised issues of causation involving the parties' comparative fault that should be resolved by a jury.

Labor Law Update

In past issues we have examined cases which dealt with what a plaintiff must prove to establish a violation of the Labor Law. Recently, the Eastern District decided a case in which the defendant raised the "recalcitrant worker" defense. As such, we will take the opportunity to discuss the current state of one of a defendant's only defenses to a Labor Law claim.

Rodriguez v. Biltoria Realty, LLC, 2003 U.S. Dist. LEXIS 3779 involves claims by two plaintiffs that they were injured while working on a device that they were using as a scaffold. Specifically, the plaintiffs were using something called a "vehicle mounted power operated articulated vertical device" as a scaffold to enable them to work on the sides of a building owned by defendant Biltoria. While standing on the device at a height of approximately twenty five feet the device began to sway and then fell to the ground. The plaintiffs alleged that they were propelled from the device and fell from the ground, sustaining injuries.

The plaintiffs then brought claims against the appropriate defendants under Labor Law section 240(1). After stating what the plaintiff must prove to prevail on such a claim, the court states that while contributory negligence is not a defense to a 240(1) claim, "a worker's active intentional conduct may release an owner from liability under the statute...in cases where it is

shown that the worker's actions were the 'sole' proximate cause of the injuries sustained."

What the court refers to as the "sole proximate cause" defense is the same as what is more typically referred to as the recalcitrant worker defense. Whatever term is used, the defense only applies "where the owner can show that appropriate safety devices were constructed, placed and operated for the work to be performed."

Not surprisingly, based on the facts, the court concludes that the accident and the injuries at issue clearly fall within the scope of section 240. In opposition to the motion, defendant Biltoria relied on the recalcitrant worker/ sole proximate cause defense. According to Biltoria, the plaintiffs were told to use wooden planks to level the device they were standing on, but refused. Biltoria further argued that the plaintiffs were provided with harnesses that might have protected them from the fall, but they failed to use them.

The court concluded that the defendants had raised an issue of fact, however, the court was skeptical that the defense would work at trial. The court states that at trial, "the burden faced by Biltoria will be high", as they must show that the plaintiffs failure to use the safety devices was the sole proximate cause of the injury.

The court's language shows that the recalcitrant worker defense will very often, at best, be sufficient to defeat a summary judgment, but will ultimately insufficient to defeat the plaintiff;s Labor Law Claim. With so much uncertainty and flux in the 240 caselaw, this is at least one area where the law is clear.

Appellate Review

In our November, 2002 issue we discussed the case of Reed v. City which had recently been argued before the Appellate Division, Second Department. Although not really significant for anything other than the attitude of the judges hearing the appeal, we discussed Reed because

it serves as a reminder to defendants of the importance of preparing every case for trial.

Reed involved a plaintiff who was catastrophically injured when she was run down by a police officer on a motor scooter. She sustained multiple skull fractures, brain damage, memory loss, a loss of the senses of taste and smell and difficulty sleeping. The plaintiff called a number of experts to testify about both the plaintiff's present condition and the problems she would have in the future. The City retained a neurologist, however did not call any expert witnesses. Ultimately, the jury awarded \$6 million. The City appealed in the hope that the Appellate Division would reduce the jury award as excessive, a tact often taken by the City.

According to the accounts of the oral arguments before the Appellate Division, the judges took the Assistant Corporation Counsel to task for basically failing to offer a defense at trial. Given the apparent harsh tone of the judges, we have been awaiting the decision with some interest. The decision was recently released.

In Reed v. City, 2003 N.Y. App. Div. LEXIS 1287, the court spends a fairly long time covering the facts, the trial testimony and the standard of review. After reviewing those items, the court concluded that the jury's award did not deviate materially from what would be reasonable compensation, and in fact, felt the award was entirely justified given the devastating injuries sustained by the plaintiff. The court does go on to address each issue raised by the City, but rather quickly finds that none of them have any merit.

There is nothing in the opinion which would lead one to believe that the Appellate Division disapproved of the City's trial tactics. Nevertheless, the short shrift that the court gave to the defendants arguments should serve as a warning sign to defendants not to rely on the Appellate Division to bail them out when things go wrong. As we previously pointed out, there is always something a defendant can do in an attempt to minimize the plaintiff's claim, even

where the claim is very strong, as in Reed, At the least, a vigorous defense can often force a favorable settlement.